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5  
6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

8 \_\_\_\_\_  
George P. Chapman, Jr., et al

9 Plaintiffs

3:09-cv-00228-RJC-VPC

10 vs.

11 Deutsche Bank National Trust  
12 Company, et al.,

13 Defendants.  
14 \_\_\_\_\_

**NOTICE OF MOTION AND  
MOTION TO DEMAND A HEARING  
UPON DEFENDANTS' REQUEST  
FOR JUDICIAL NOTICE;  
OPPOSITION TO MOTION TO  
DISMISS**

15 COMES NOW, Plaintiffs, George P. Chapman, Jr. And Brenda Chapman, by and  
16 through their undersigned counsel, Terry J. Thomas, Esq., and hereby moves this Court for a  
17 hearing upon Defendants' Request for Judicial Notice in addition to the other items  
18 scheduled for the January 8, 2009 hearing. This motion is based upon Federal Rule of  
19 Evidence 201, this Opposition to Defendants' Motion to Dismiss, the accompanying  
20 Memorandum of Points and Authorities in Support of Motion, attached exhibits and all  
21 pleadings on file herein.

22  
23 DATED: November 9, 2001

24 By: \_\_\_\_\_/S/  
Terry J. Thomas Attorney for Plaintiffs  
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26  
27  
28

OPPOSITION TO MOTION TO DISMISS

**MEMORANDUM OF POINTS AND AUTHORITIES****I.****INTRODUCTION**

Due to the resignation of Judge Sandoval, Plaintiffs' Motion to Remand this case back to state court has not been adjudicated. Although Defendants have unlimited funds to pay their counsel, Plaintiff George Chapman, a Marine veteran and cancer victim lives on Social Security. Paying Chapman's counsel to file an Opposition to Defendants' Motion to Dismiss *before* his Remand motion was adjudicated seems a premature expense. This Court may decide it has no jurisdiction, thus no reason to consider Defendants' motion. This Opposition has now become timely since Defendants' Motion is scheduled for oral argument at the same time Plaintiffs' Motion to Remand will be heard.

Plaintiffs were attempting to modify a mortgage taken out to pay for Plaintiff George Chapman's cancer treatments. They fell behind on payments but were constantly told that everything would be worked out; that new interest and payment rates would modify the mortgage in order to allow Plaintiffs' to keep their home. Like almost everyone in Nevada, the value of Plaintiffs' home plummeted along with Brenda Chapman's earnings.

Unbeknownst to Plaintiffs, Defendants were in the process of foreclosing upon their home while negotiating a loan modification. Plaintiffs were never given the NRS mandated statutory notice of default; nor notice that foreclosure was scheduled; nor notice of the trustee's sale and no notice of the filing of a deed upon their property. Out of State Defendants prefer to throw a family out in the street rather than modify a mortgage to the home's short sale value. What makes this behavior so maddening is that Defendants can only receive the short sale value from a foreclosure sale—plus must pay the costs associated with a foreclosure. So why throw families out in the street when there is no more money to be made—even if the communities they devastate are in someone else's community?

1           Apparently the “servicer” of Plaintiffs’ mortgage does make lots and lots of money on  
 2   foreclosures---- with thousands of dollars in foreclosure fees. Thus, has been formed the  
 3   “Foreclosure Industry.” Since most recent mortgages, such as Plaintiffs,’ have been put into  
 4   a “pool” to maximize profits, the actual “owner” of the mortgage, if one actually exists,  
 5   becomes a mystery to the home owner as well as this Court and makes the “owner” unable to  
 6   prove it has legal standing to foreclose!

7           On or about October 15, 2008, a trustee’s deed of sale was recorded stating that  
 8   Plaintiffs’ home was sold to Defendant:

9                           “Deutsche Bank National Trust Company, as Trustee under Pooling and  
 10                          Servicing Agreement Dated as of January 1, 2006 Morgan Stanley ABS  
 11                          Capital I Inc., Trust 2006-NCI Mortgage Pass-Through Certificates, Series  
 12                          2006-NC.”

13           Counsel for Defendants corrects Plaintiffs’ complaint, stating they erroneously sued  
 14   just plain old Deutsch Bank National Trust Company, when the real “owner” is as stated  
 15   above. (See caption on page 1 of Defendants’ Motion to Remove and to Dismiss). This  
 16   German National Bank may or may not actually have access to, or hold, some nebulous  
 17   security instrument that somehow includes a reference to part of Plaintiffs’ interests in their  
 18   home. But they have to PROVE it! And, Deutsch Bank’s counsel has not bothered to even  
 19   attempt to prove that the trustee for: “Pooling and Servicing Agreement Dated as of January  
 20   1, 2006 Morgan Stanley ABS Capital I Inc., Trust 2006-NCI Mortgage Pass-Through  
 21   Certificates, Series 2006-NC,” has legally sufficient standing to force Plaintiffs from their  
 22   home.

23           In Summary: Plaintiff’s complaint adequately pleads that the foreclosure was legally  
 24   inadequate, that proper NRS foreclosure procedure was followed. Plaintiffs allege that  
 25   Defendants have no ownership interests to assert; that their foreclosure was wrongful and  
 26   must be set aside, and; that wrongful foreclosure supports punitive damages according to a  
 27   new Nevada Supreme Court case. All issues of fact entitling Plaintiffs to a trial on the  
 28   merits.

Defendants' Motion to Dismiss: Defendants focus upon Plaintiff's inability to prove the underlying case. Defendants base their entire Motion upon their corresponding Request for Judicial Notice containing about 50 pages of hearsay photocopies of photocopies that appear to be some loan and title documents, with great gaps in purported assignments from several unidentified foreign entities to other unidentified foreign entities. Defendants attached the label of "Judicial Notice," thus self-excusing themselves from the burden of authentication. It is screamingly obvious that these photocopies are NOT judicially noticeable under Fed. R.Evid. 201.

## II.

### PLAINTIFF DEMANDS THE SCHEDULED ORAL ARGUMENT INCLUDE A HEARING ON THE REQUEST FOR JUDICIAL NOTICE

To challenge the propriety of taking judicial notice a party must file a motion requesting an opportunity to be heard. *Chen v. Metropolitan Ins. & Annuity Co.* (5<sup>th</sup> Cir. 1990) 907 F2d 566, 569. The court must provide an opportunity to be heard. *Cooperative de Ahorro y Credito Aguada v. Kidder, Peabody & Co.* (1<sup>st</sup> Cir. 1993) 993 F2d 269, 273). Plaintiff's request is timely because there was simply no point in responding to any of Defendants' Motions or Request for Judicial Notice since the all important issue of this Court's jurisdiction is still in question. If this Court has no jurisdiction, then Defendants' motions and Plaintiffs' responses are mere expensive exercises.

## III.

### NONE OF THE PHOTOCOPIES OF PHOTOCOPIES MEET THE REQUIREMENTS FOR JUDICIAL NOTICE

The recent case of *Walker v. Woodford* (SD CA 2006) 454 F.Supp.2d 1007, 1022, contains an excellent discussion of the law of Judicial Notice:

The Rule was intended to obviate the need for formal fact-finding as to certain facts that are undisputed and easily verified. Fed. R.Evid. 201; *Melong v. Micronesian Claims Comm.*, 643 F.2d 10, 12 n. 5 (D.C.Cir.1980) (judicial notice under Rule 201 is designed for judicial

1 recognition of scientific or historical fact without resort to cumbersome  
2 methods of proof). The Rule permits a court to take judicial notice of two  
3 kinds of facts: (1) those that are generally known within the court's  
4 territorial jurisdiction; and (2) those that are capable of accurate and ready  
5 determination by resort to sources whose accuracy cannot reasonably be  
6 questioned, for example, almanac, dictionary, calendar or similar source.  
7 In other words, "the fact must be one that only an unreasonable person  
8 would insist on disputing." *United States v. Jones*, 29 F.3d 1549, 1553  
9 (11th Cir.1994). Documents that are part of the public record may be  
10 judicially noticed to show, for example, that a judicial proceeding  
11 occurred or that a document was filed in another court case, but a court  
12 may not take judicial notice of findings of facts from another case. See  
13 *Wyatt v. Terhune*, 315 F.3d 1108, 1114 & n. 5 (9th Cir.2003); *Lee v. City*  
14 *of Los Angeles*, 250 F.3d 668, 689 (9th Cir.2001); *Jones*, 29 F.3d at 1553.  
15 Nor may the court take judicial notice of any matter that is in dispute. *Lee*,  
16 250 F.3d at 689-90; *Lozano v. Ashcroft*, 258 F.3d 1160, 1165 (10th  
17 Cir.2001)....

18 Plaintiffs dispute virtually everything about Defendants' photocopies. For example,  
19 Defendants' Request does not bother to even attempt to authenticate the photocopies of  
20 photocopies. Apparently counsels' secretary merely provided this Court with a list of what  
21 the secretary considers to be contained within the Request. Defendants must introduce  
22 evidence sufficient to sustain a finding that the item is what the proponent claims it to be  
23 (Fed. R.Evid. 901) or the establishment of facts sufficient to constitute self-authentication  
24 under Fed. R.Evid. 902. (See *United States v. Thomas* (2<sup>nd</sup> Cir. 1995) 54 F3d 73, 82 –  
25 authentication through testimony of knowledgeable witness. Burden of proof is upon the  
26 proponent: Fed. R.Evid. 901(a) *United States v. Gagliardi* (2<sup>nd</sup> Cir. 2007) 506 F3d 140, 151.  
27 Clearly Defendants' counsels' secretary does not have personal knowledge under 901(b)(1)  
28 of what he or she has listed as a description.

29 The Court may refuse to take judicial notice if the requesting party has failed to  
30 authenticate the documents. *Madeja v. Olympic Packers, LLC* (9<sup>th</sup> Cir 2002) 310 F3d 628,  
31 639. It is NOT proper for a court to take judicial notice of disputed facts contained in  
32 hearsay document. See *United States v. Burch*, 169 F.3d 666, 672 (10th Cir.1999).

Unauthenticated photocopies are the purest form of hearsay. The law is clear, judicial notice should be used “sparingly” in the early stages of litigation. “Only in the clearest of case should a district court reach outside the pleadings for facts necessary to resolve a case at that point.” *Victaulic Co. V. Tieman* (3<sup>rd</sup> Cir. 2007) 499 F3d 227, 236.

#### IV.

#### THE NEVADA LEGISLATURE RECOGNIZED THE NEED TO PROVIDE ORIGINALS OR CERTIFIED COPIES

Out-of-State lenders’ “trustees” and their vassals have a well deserved reputation for avoiding the laws of document authentication when removing Nevadans from their homes. Recognizing this the Nevada Legislature recently passed AB 149, that mandates mediation before a trustee may foreclose. The addition to NRS 107.080, subsection 4, states in relevant part: “...The beneficiary of the deed of trust shall bring to the mediation the original or a certified copy of the deed of trust, the mortgage note and each assignment of the deed of trust or mortgage note....” (Emphasis added.)

This Court should apply current Nevada law to this case. Clearly Nevada Law mandates the Defendants to produce an: “...original or a certified copy...” of

1. The deed of trust.
2. The mortgage note
3. Each assignment.

NOT photocopies of photocopies.

The Nevada Supreme Court’s Rules for the certification of mortgage documents requires:

1. The name, address, capacity, and authority of the person making the certification;
2. The person making the certification is in actual possession of the original mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust; and
3. The attached copy of the mortgage note, deed of trust, and each assignment of the deed of trust, and assignment of the deed of trust in the possession of the person making the certification. (Nevada Supreme Court’s Amended Foreclosure Mediation Rules)

The need for the above requirements is amply illustrated by Defendants’ Ex. 4, which

1 purports to be a "Substitution of Trustee" recorded on 07/09/08. However, NO such  
 2 document appears on the Washoe County Recorder's chain of title documents! (See true and  
 3 correct copy of page 3 of its chain of title list for Plaintiffs' property showing the last 14  
 4 entries covering the 07/09/08 date, EX 1.)

5 Defendants' Exhibit 5 consists of obviously fabricated Certified Mail receipts with the  
 6 "label" containing Plaintiffs' name and address crudely pasted to a photocopy. These  
 7 fabricated receipts do not have the proper post office stamps and the post office track and  
 8 confirm do NOT even show that the "item" was delivered to the Plaintiffs' address. See  
 9 especially Ex. 5, P.5 of 7 showing: "Your item was delivered ... in PHOENIX AZ..."

#### 10 V.

#### 11 PLAINTIFF'S COMPLAINT ADEQUATELY PLEADS ITS CLAIMS FOR RELIEF

12 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal  
 13 sufficiency of the plaintiffs claims. A claim can be dismissed only if "it is clear that no relief  
 14 could be granted under any set of facts that could be proved consistent with the complaint."  
 15 *Swierkiewicz v. Sorema*, 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). The issue  
 16 is not whether the plaintiff will ultimately prevail, but solely whether he has stated a claim  
 17 upon which relief could be granted. *Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir.2003).

18 Plaintiff's first claim for relief asks for injunctive and declaratory relief alleging that  
 19 she was never given the statutory notice of:

- 20 1. The trustee's sale.
- 21 2. The name and location of the entity that had obtained either legal or physical  
 22 possession of the promissory note and deed of trust on her property.
- 23 3. Plaintiff was never given notice of which entity became the trustee on the  
 24 promissory note and deed of trust.

25 These Notices were and are required by NRS 107.080. They must be mailed and  
 26 published. Plaintiffs' prayer asks for a declaratory judgment that the trustee's purported sale  
 27 of their home on or about October 15, 2008, was improperly noticed, improperly carried out  
 28 and is null and void ad initio. And, that Plaintiffs are entitled to a preliminary and

1 permanent injunction to prohibit Defendants from foreclosing upon their home.

2 The recent Nevada Supreme Court case of *Countrywide Home Loans v. Thitchener*,  
3 192 P.3d 245 (2008) supports an award of punitive damages for wrongful foreclosure if the  
4 elements are proven at trial. Plaintiffs have properly plead wrongful foreclosure, thus are  
5 entitled to prove this element of damages.

## 6 VI.

### 7 PLAINTIFFS ADEQUATELY PLED THEIR QUIET TITLE

#### 8 ACTION UNDER NRS 40.010

9 NRS § 40.010 states: “**Actions may be brought against adverse claimants.** An  
10 action may be brought by any person against another who claims an estate or interest in real  
11 property, adverse to him, for the purpose of determining such adverse claim.”

12 Plaintiffs alleged:

13 1. “...that no defendant owns or possesses their promissory note or their deed of trust;  
14 that no defendant can properly be a plaintiff or has legal standing to foreclose upon their  
15 property; that all rights, title and interest in their property were sublimated into a non-  
16 functional “security” instrument that gives no one entity rights in individual notes and deeds  
17 of trust. Thus no entity has legal standing to oppose this complaint.”

18 2. “...that since no entity has obtained all the rights necessary to obtain an interest in  
19 plaintiffs’ property, no entity has such interest.”

20 3. “...that Defendants’ insistence upon their rights to receive payments from Plaintiffs  
21 with no proof of the ownership of any rights, titles, interests, or liens upon Plaintiffs’  
22 property have placed a cloud upon plaintiffs’ title.”

23 Plaintiffs also pled that they were living in the home and; that all Defendants are  
24 asserting adverse claims against their home. Thus all necessary elements are properly pled  
25 for a quiet title action.



**CONCLUSION**

At stake here is perhaps much more than the question of whether a Defendants' counsel can submit a bunch of hearsay photocopies (some with the warning word "COPY" across them, making them photocopies of photocopies) and claim they prove Plaintiff cannot state claims for relief. The big question is: "May mortgage lenders/trustees avoid the last 100 years or so of the law concerning the admission of documentary evidence by the simple act of requesting Judicial Notice for hearsay photocopies?" Defendants ask this Court to just skip the usual authentication requirements for documentary evidence and take their secretary's listings as sufficient to dismiss Plaintiff's case.

As far as Plaintiff can determine, the U.S. Congress has not yet exempted Defendants and its brother members of the "too-big-to-fail-club," recipients of the \$750 BILLION in TARP funds, from the Federal Rules of Evidence. This Court is respectfully requested to avoid fashioning enough exemptions from existing Black Letter Law to dismiss Plaintiffs' complaint

This Court is respectfully requested to strike Defendants' request for judicial notice based upon the screamingly obvious— these papers are pure hearsay and are not even close to fitting under the mantel of judicial notice. Thus, no admissible evidence has been submitted by Defendants, and deny Defendants' Motion to Dismiss.

DATED: November 9, 2009

By: \_\_\_\_\_/S/ \_\_\_\_\_

Terry J. Thomas Attorney for Plaintiff